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No. 87-1303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
WEST VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITIONER'S REPLY MEMORANDUM

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No argument stated in Respondent's Brief In Opposition counsels against this Court's granting the Petition for Writ of Certiorari. In fact, the Brief In Opposition demonstrates that summary reversal of the judgment below, and reinstatement of the Order of the Circuit Court for Webster County, West Virginia, is appropriate pursuant to this Court's Rule 23.1.

1. Respondent's effort to create a factual issue about the assessment practices of the Webster County Assessor is unavailing. In the first instance, the isolated passages from the transcript of the 1985 proceedings before the

Webster County Commission that respondent includes in its Appendix do not support its factual contentions. The expert who testified for East Kentucky Energy Corporation (the petitioner in No. 87-1310) in February, 1985, clearly stated that the tracts of property later included in trial Exhibit B were comparable to petitioner's property. *See* Opposition, Appendix at pp. 9a-13a. Moreover, the Circuit Court found as a fact that these tracts, assessed at a value equivalent to 3% of the assessments on petitioner's property, were in all respects comparable to petitioner's property. *See* Petition, Appendix D at pp. 16a, 21a, 24a, 29a. This finding of fact was not disturbed on appeal. *See* Petition, Appendix A at pp. 5a-6a.[1]

The County Assessor's testimony that she uniformly raised by 10 percent the assessments of all properties not recently conveyed during the years 1976, 1982 and 1984, *see* Opposition at 12-13, is of no real consequence. The fact is that petitioner's property was assessed at an average rate of $1,688.64 per acre in 1976, while property comparable in all respects was assessed at $48.15 per acre. *See* Petition at 6; Appendix D at p. 24a. It would be small consolation to petitioner that the Assessor raised the assessments on comparable property by 10 percent (to $52.97) in 1982, and by 10 percent again (to $58.27) in 1984. Petitioner was unconstitutionally overassessed in 1976 by a factor of 35 to 1. The "remedy" applied by the Webster County Assessor resulted in an unconstitutional overassessment of petitioner's property in 1984 by a factor of 29 to 1. This "remedy" resulted in petitioner paying "only" 29 times its fair share of the County's tax burden, rather than the multiple of 35 times its fair

[1] Indeed, respondent stipulated in the 1983 and 1984 proceedings that the properties adjoining petitioner's were "comparable . . . in that they are substantially the same geologically as the property of the Petitioner." *See* Brief of the Appellees, filed in the Supreme Court of Appeals of West Virginia, at 44.

share that it previously had paid. The discrimination that resulted from the Webster County Assessor's methods was gross, systematic and intentionally discriminatory, as the Circuit Court found.

2. Respondent relies on decisions from the courts of other states that have permitted temporary deviations from the "utopian" goal of perfect equality in assessment. *See* Opposition at 6-9. Those state court decisions, discussed in *Kline* v. *McCloud*, —— W. Va. ——, 326 S.E.2d 715 (1984)—even if accepted by this Court as adopting an appropriate equal protection standard—would not afford legitimacy to the Webster County Assessor's unconstitutional scheme of assessment. *First*, the deviations from the norm of equality demonstrated in the record of this case are not slight; they are enormous. *Second*, these enormous deviations are in no sense temporary. As demonstrated in the Circuit Court's opinion, if the Webster County Assessor continued to increase the assessed values of other comparable properties by 10 percent every year or two, and never increased the assessments on petitioner's property, it would still take over 500 years for the County's property tax burden to be fairly apportioned. *See* Petition, Appendix D at p. 28a. *Third*, this is not a case in which the Assessor utilized evidence of recent sales to update periodic county-wide property reappraisals. The record demonstrates instead that the assessment system used in Webster County establishes the most recent conveyance price as the conclusive guide for assessed value. There have been no periodic re-evaluations of the market value of real property on a county-wide basis. If property ownership remains within the same hands for decades it never will be fairly assessed, and the "strangers" in the County will continue to pay an exorbitant share of the property tax burden.

In sum, this is not a case in which petitioner seeks "precise, scientific uniformity" in the assessment of Web-

ster County property. *See Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959). Petitioner seeks only that basic fairness in the assessment of real property that the Equal Protection Clause, and this Court's decisions, require. *See Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); Petition at 15-20.

3. Respondent concedes that "it is the settled law of the State of West Virginia that if a taxpayer's property is assessed at market value, if the taxpayer believes that other property is not assessed at market value, his remedy is to compel the other assessments to be raised and he is not entitled to have [his assessment] lowered." Opposition at 13. This statement of West Virginia's "settled law" was the linchpin of the Supreme Court of Appeals' decision denying relief to petitioner. *See* Petition, Appendix A at pp. 8a-10a. The "settled law" of West Virginia is unconstitutional as this Court repeatedly has made clear, most recently in *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 623-24 (1946). *See also Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Cumberland Coal*, *supra*, 284 U.S. at 28-29; *Sioux City Bridge*, *supra*, 260 U.S. at 446; Petition at 20-24. Remarkably, respondent has failed to address any of these unanimous decisions of this Court, each holding that the precise remedy offered by West Virginia to petitioner in this case is "not adequate to protect [the taxpayer's] rights under the federal Constitution." *Township of Hillsborough*, *supra*, 326 U.S. at 624.

Respondent seeks to circumvent the holdings of this Court by relying on an isolated passage from this Court's decision in *Liggett Co.* v. *Lee*, 288 U.S. 517 (1933). *See* Opposition at 14. *Liggett Co.* involved a multi-faceted challenge by chain-store owners to the business licensing taxes established under Florida law. This Court held that certain aspects of that legislation violated the Equal

Protection Clause, but that other aspects of Florida's law were not unconstitutional. *See* 288 U.S. at 532-39. The passage from *Liggett Co.* that is quoted by respondent dealt with the chain-store owners' allegation in their complaint "that the state officials charged with the administration of the act have failed to demand the tax and do not intend to collect it from the owners of stores in certain lines of business, such as furniture dealers." *Id.* at 539. In deciding that the chain-store owners' only remedy for this alleged dereliction of duty was to apply for a writ of mandamus under state law, Justice Roberts expressly distinguished this Court's earlier holdings in *Cumberland Coal* and *Iowa-Des Moines National Bank*:

> The principle upon which those cases rest is that where a statute lays a tax upon property *ad valorem* at an even and equal rate, discrimination may result from the fact that the assessing officials systematically and intentionally value some property subject to the tax at a proportion of its true value different from that fixed with respect to other like property. . . . *This court has said that in the case of unequal and discriminatory assessment, to hold that the complaining taxpayer's only remedy is to have the assessments on all the other property raised to a level equal with that of his own is in effect to deny any remedy whatever. As a consequence redress is afforded by requiring the assessing body to revise the complainant's assessment to the level of those upon other like property.*

Id. at 539-40 (emphasis added).

The *Liggett Co.* Court went on, in the passage quoted by respondent, to distinguish the chain-store owners' challenge to the alleged breakdown in the collection of state taxes from the holdings in *Cumberland Coal* and *Iowa-Des Moines National Bank*, which establish a constitutional requirement that proven, systematic, over-assessment must be remedied by a reduction in tax. The decision in *Liggett Co.* v. *Lee* thus reaffirms the conclusion that the

"remedy" afforded petitioner under the "settled law" of West Virginia is the same unconstitutional remedy that has been consistently, and unanimously, rejected by this Court.

Respondent's Opposition makes clear that the West Virginia Supreme Court of Appeals has consistently flouted this Court's precedents, and has denied petitioner and similarly-situated property owners the equal treatment in property tax assesment that the Equal Protection Clause demands. The Petition for Writ of Certiorari should be granted, and the judgment of the West Virginia Supreme Court of Appeals summarily reversed.

Respectfully submitted,

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